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IN THE

Supreme Court of the United States

OCTOBER TERM 1997

WISCONSIN DEPARTMENT OF CORRECTIONS, *et al.*,
Petitioners,

v.

KEITH D. SCHACHT,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF 22 STATES IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI*

The 22 *amici* States are interested in this case because it implicates their sovereignty and their right to employ a federal forum on an equal basis with other litigants. In the decision below, the Seventh Circuit used the Eleventh Amendment, which addresses States' separate sovereignty, to

rob States of the legitimate litigation tool of removal under 28 U.S.C. § 1441. By holding that States and State officials cannot remove to federal court a lawsuit that contains any claim barred by the Eleventh Amendment, the Seventh Circuit has perverted the Amendment's meaning by placing States in a position subordinate to all other litigants.

The States' sovereign interest is to retain the authority to use the federal courts in appropriate cases. The Seventh Circuit's decision undermines the States' authority in litigation by restricting their freedom to remove appropriate cases to federal court for the adjudication of federal claims.

States and State officials may remove for a variety of reasons. First, States may choose a federal court because of its expertise in a particular area of law such as federal civil rights law, antitrust, Medicaid, or other substantive areas involving complex federal statutory schemes. Second, States may choose federal courts to obtain particular procedural protections not available in State forums. For example, after *Johnson v. Frankel*, 117 S. Ct. 108 (1997), States may select a federal forum because it assures State actors of interlocutory review of the denial of qualified immunity, a benefit not conveyed by all State systems. Third, States also may select a federal forum for reasons of simple convenience.

But the Seventh Circuit's decision deprives States of their sovereign power to choose the forum in which a federal claim is to be heard, a choice that all other litigants possess. Instead, the Seventh Circuit has placed exclusive control of forum selection in the hands of plaintiffs suing States or State entities. A plaintiff who is a clever pleader can defeat removal under the Seventh Circuit's approach by including any Eleventh-Amendment-barred claim in its complaint.

The *amici* States ask this Court to hold that States may remove an action under section 1441 even when the action contains a claim barred by the Eleventh Amendment. That ruling would show proper respect both for the interests guarded by the Eleventh Amendment and the interests protected by the removal statute. In this brief, the States argue that the removal statute's plain language permits removal even when one or more claims would be barred by the Eleventh Amendment.

SUMMARY OF ARGUMENT

The plain words of the removal statute establish that actions such as this one — containing some claims falling within federal question jurisdiction and others outside the original jurisdiction of federal courts — are removable. The claims within federal jurisdiction under 28 U.S.C. § 1331 and those that, standing alone, are outside federal jurisdiction constitute a single "civil action" removable under 28 U.S.C. § 1441(a). A case like Schacht's is removable because he could have filed the entire case in federal court in the first place, although some of the claims would have been dismissed or remanded.

The Court's recent decision in *City of Chicago v. International College of Surgeons*, 118 S. Ct. 523 (1997), similarly interprets the phrase "civil action" to include non-federal claims when they are joined with federal claims. The Seventh Circuit made the same mistake in this case as in its now-reversed *College of Surgeons* opinion, ruling in both instances that a case could not be removed because it contained a single claim that was not within the original jurisdiction of the federal courts. Because both *College of*

Surgeons and *Schacht* contain claims within section 1331 jurisdiction, both cases are removable.

Other cases decided by this Court show that the Eleventh Amendment bars only particular claims against the State, not entire actions including such barred claims. To hold otherwise would permit the very forum-shopping that section 1441 was designed to prevent.

ARGUMENT

A district court's jurisdiction over a removed action is not defeated by the mere presence of a claim barred by the Eleventh Amendment.

I. The language of 28 U.S.C. § 1441 establishes that Eleventh-Amendment-barred claims do not defeat removal.

The Seventh Circuit erroneously remanded Respondents' entire action on the ground that it contained a state claim barred by the Eleventh Amendment. Under the plain words of 28 U.S.C. § 1441, removal of the entire action should have been permitted because the entire action could have been brought originally in federal court under 28 U.S.C. § 1331. Once the action was removed, any claims not properly before the federal court should have been treated just as if the case had been brought originally in federal court: they should be dismissed or remanded to State court as appropriate.

The statute permits removal of "any civil action . . . of which the district courts . . . have original jurisdiction." 28 U.S.C. § 1441(a). In this case, all of Schacht's claims could have been brought initially in federal court in a single action under 28 U.S.C. § 1331, so the entire case was removable. If

Schacht had filed initially in federal court, his claims for money damages against the State, State agencies, and State employees sued in their official capacities would have been barred by the Eleventh Amendment and, therefore, remanded or dismissed subject to re-filing in State court. *See Kruse v. Hawaii*, 68 F.3d 331, 334 (9th Cir. 1995) (dismissing Eleventh-Amendment-barred claims and remanding other claims after removal, relying on *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 120-21 (1984)).

City of Chicago v. International College of Surgeons, 118 S. Ct. 523 (1997), confirms that cases may be removed even when they contain claims that, standing alone, would not be within the original jurisdiction of the federal courts. In *College of Surgeons*, the Court determined that "civil action" in section 1441 means the *entire* action initially filed in State court, including both federal claims and claims over which the federal court would not have jurisdiction if they stood alone. 118 S. Ct. at 531. Federal claims and claims falling outside original federal jurisdiction thus constitute a single "civil action." *Id.* at 530. Therefore, if a civil action contains even one federal claim, the civil action is properly removable under section 1441, and the federal court may either exercise its supplemental jurisdiction over the non-federal claims or remand them if appropriate. *Id.* at 533-34.

The Seventh Circuit's reading of the phrase "civil action" in section 1441 in this case cannot be squared with this Court's construction of the identical phrase in 28 U.S.C. § 1367(a) in *College of Surgeons*. Indeed, the Seventh Circuit's erroneous holding in *College of Surgeons* was premised upon its flawed interpretation of "civil action" — the very same mistake it made in this case. The Seventh Circuit incorrectly held that *College of Surgeons* was not a removable "civil action" because it contained a state claim

that the district court could not adjudicate independent of any other grant of jurisdiction. *International College of Surgeons v. City of Chicago*, 91 F.3d 981, 944 (1996). The Court corrected the Seventh Circuit's flawed interpretation, holding that a "civil action" includes federal claims and claims falling within the federal court's supplemental jurisdiction under section 1367. *College of Surgeons*, 118 S. Ct. at 531.

This reasoning applies precisely to this case, dictating that a "civil action" containing federal claims and claims barred by the Eleventh Amendment is removable under section 1441. There is no basis to hold that "civil action," as construed in *College of Surgeons*, excludes claims barred by the Eleventh Amendment. Rather, as in *College of Surgeons*, the entire case — including federal claims and claims outside original federal jurisdiction — constitutes the "civil action" that is removable, although certain claims may have to be remanded to State court following removal. *See College of Surgeons*, 118 S. Ct. at 531. The mere presence of claims barred by the Eleventh Amendment does not defeat removal.

II. The Court's decisions establish that the presence of an Eleventh-Amendment-barred claim does not defeat jurisdiction.

The Court's settled precedent underscores that the Eleventh Amendment bars only particular claims against the State; it does not foreclose federal jurisdiction over whole cases that include such barred claims. *See Pennhurst*, 465 U.S. 89; *Alabama v. Pugh*, 438 U.S. 781 (1978). *See generally* Mitchell N. Berman, Note, *Removal and the Eleventh Amendment: the Case for District Court Remand Discretion to Avoid a Bifurcated Suit*, 92 MICH. L. REV. 3 (1993).

In *Pugh*, the Court dismissed claims against the State of Alabama and its board of corrections on Eleventh Amendment grounds, yet upheld the federal judgment against state officials sued in their individual capacities. *Id.* at 781-82. Because a federal court's lack of subject-matter jurisdiction cannot be waived, *Pugh* must stand for the proposition that the Eleventh Amendment represents a jurisdictional bar only to claims, not to entire cases that contain claims subject to Eleventh Amendment immunity. *See also Pennhurst*, 465 U.S. at 121 ("A federal court must examine each *claim* in a case to see if the court's *jurisdiction over that claim* is barred by the Eleventh Amendment.") (emphasis added).

This precedent establishes that civil actions containing both barred and non-barred federal claims may be removed or brought in federal court in the first instance, even though the district court must remand or dismiss the barred claims. Because civil actions containing both barred and non-barred claims are thus within the district court's "original jurisdiction," they are removable under section 1441(a) if brought initially in a state forum.

Neither the statute's text nor its purpose supports the contrary result — adopted in the Fifth and Seventh circuits[1] — that a plaintiff can foreclose federal-question removal merely by joining a claim barred by the Eleventh Amendment. These decisions permit precisely the forum-shopping that section 1441 was designed to preclude, allowing plaintiffs who plead cleverly to bar removal by States. The decisions also place States in an inferior position

[1] *Frances J. v. Wright*, 19 F.3d 337 (7th Cir.), *cert. denied*, 513 U.S. 876 (1994); *McKay v. Boyd Constr. Co.*, 769 F.2d 1084 (5th Cir. 1984).

to all other litigants in relation to removal by erecting a bar that applies to no other litigant.

It would be ironic if the amendment constitutionalizing state sovereign immunity in litigation prevented States from removing non-barred federal claims when the States want them adjudicated in a federal forum. The very sovereignty protected by the Eleventh Amendment should not be compromised by restricting States' removal power as compared to all other litigants. Like other defendants, State defendants might prefer to have some non-barred federal claims heard by federal courts, whose expertise and resources may be greater than state courts, and whose decisions are more likely to produce a uniform body of federal law, given that this Court rarely reviews state-court adjudications of federal law. The proper view of federalism places States on the same footing as other litigants and lets States choose whether to remove.

The Seventh Circuit's position also prejudices non-State entities that might be parties to removed cases involving barred claims against State entities. Under the Seventh Circuit's theory, a non-State entity is precluded from removing an action to federal court if the complaint contains an Eleventh-Amendment-barred claim, even if all claims against the removing party are removable. *See, e.g., Lowery v. Prince George's County*, 960 F. Supp. 952, 957 (D. Md. 1997) (when county and State are both sued, county may not remove under section 1441 when one or more claims barred by Eleventh Amendment). This point is particularly important because non-barred claims in these cases most often are claims against State officials in their individual capacities, and the Seventh Circuit's view prevents those individuals from obtaining a federal forum to adjudicate federal claims against them.

This bizarre result could also obtain when one of the parties sued in State court is the United States, one of its agencies, or one of its officers, because 28 U.S.C. § 1442 also uses the phrase "civil action." Under the Seventh Circuit's interpretation of "civil action," when State and federal defendants are sued in the same case, the federal defendants might be precluded from removing the case if it contained Eleventh-Amendment-barred claims against the State. As the Seventh Circuit interprets "civil action," the Eleventh Amendment might constitute a jurisdictional bar against removal of the entire case, despite the language of section 1442.

The irony of the Seventh Circuit's position is further underscored by the fact that the claims that would most often bar removal under the Seventh Circuit's analysis are generally dismissable in any forum. As in this case, the claims most frequently found to fall within the Eleventh Amendment bar are claims for damages against the State and its agencies under 42 U.S.C. § 1983. But those claims must be dismissed in any forum because States, their agencies, and their employees in their official capacities are not "persons" as defined in Section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). Thus, the very claims most likely to bar removal under the Seventh Circuit's interpretation would have to be dismissed in any forum.

CONCLUSION

This Court should reverse the judgment of the Seventh Circuit.

Respectfully submitted,

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